Supreme Court, U.S.
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No. 97-163

In the Supreme Court of the United States

OCTOBER TERM, 1996

TOMMY L. SWANSON, PETITIONER

v.

GENERAL SERVICES ADMINISTRATION,
ROGER W. JOHNSON, ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ROBERT S. GREENSPAN
JENNIFER H. ZACKS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner presented insufficient evidence of race discrimination or retaliation to sustain a jury verdict in his favor.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A30) is reported at 110 F.3d 1180. The opinion of the district court (Pet. App. A32-A33) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1997. The petition for a writ of certiorari was filed on July 23, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is an African-American man who was employed as a Supervisory Building Management Specialist at a New Orleans, Louisiana, office of the General Services Administration (GSA) from October 1988 to May 1992. He filed this Title VII suit in March 1994, alleging race discrimination and retaliation for his having filed Equal Employment Opportunity (EEO) complaints. Pet. App. A8-A9.

Because petitioner alleged discrimination and retaliation occurring both before and after the effective date of the Civil Rights Act of 1991, the claims arising prior to that date were tried to the district court, while those arising after that date were tried to the jury. Pet. App. A9; see 42 U.S.C. 1981a(c)(1). The court found for GSA on all of the pre-Act claims. Pet. App. A10.

In his claims arising after the 1991 Act, petitioner alleged that GSA had discriminated or retaliated against him by, among other things, denying him parking privileges, disciplining him for tardiness, reducing his supervisory responsibilities, and reassigning him to an office in Fort Worth, Texas. Pet. App. A10. The jury returned a verdict for petitioner on those claims. *Ibid.* The district court denied GSA's post-trial motion for judgment as a matter of law. *Id.* at A32-A33.

The court of appeals reversed. Pet. App. A1-A30. Applying this Court's decision in *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502 (1993), the court held that petitioner had failed to satisfy his ultimate burden of proving that GSA had discriminated or retaliated against him. Pet. App. A12-A13. Specifically, the court concluded that petitioner had

"simply offered no evidence that tends to disprove GSA's non-discriminatory explanations" for its challenged actions, or that "otherwise connects the adverse actions in question to [petitioner's] race or his filing of EEO complaints." *Id.* at A13. Petitioner had not demonstrated that similarly situated white employees had been treated differently. See *id.* at A14, A15, A17, A20-A21, A22-A23. Nor had he presented any other facts—as opposed to mere "conclusory opinion[s]" of lay witnesses—to establish that he had been the victim of race discrimination or retaliation. *Id.* at A18; see *id.* at A15-A16, A20, A23.

Judge Dennis concurred in part and dissented in part. Pet. App. A25-A30. He agreed that the jury's verdict could not be sustained on the claims relating to petitioner's loss of supervisory responsibilities and reassignment to Fort Worth. *Id.* at A28. He would have upheld the jury's verdict, however, on petitioner's remaining claims. *Id.* at A27-28.

ARGUMENT

The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. The decision turns entirely on the facts of this case and raises no issue warranting review by this Court.

1. Petitioner first contends (Pet. 11) that the court of appeals' decision is somehow "in conflict" with *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502 (1993). He is mistaken. The court of appeals expressly followed *St. Mary's Honor Center* with regard to petitioner's burden of proof in this Title VII case. See Pet. App. A12-A13. Petitioner appears to be relying on statements in the Court's opinion that a plaintiff may be able to prevail on a Title VII claim by proving

the elements of a prima facie case and the falsity of the defendant's asserted non-discriminatory explanations for its actions. See 509 U.S. at 511. But nothing in the Court's opinion suggests that a plaintiff may adequately refute the defendant's explanations by offering nothing more than conclusory assertions unsupported by facts. That is all that the court of appeals held here. See Pet. App. A15-A16, A18, A20-A21, A23.

2. Petitioner does not contend that the decision below conflicts with the decision of any other circuit. He merely asserts (Pet. 12-13) that the court of appeals failed to follow its own precedents regarding the standard of review of jury verdicts. But intra-circuit conflicts, even where they exist, need not concern this Court. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974). No such conflict exists here. The court of appeals applied the very standard advocated by petitioner in assessing whether the jury verdict could be sustained. Compare Pet. 12 with Pet. App. A13.[1]

3. Petitioner's only remaining argument is that "the evidence supported the jury verdict" on each of his claims. See Pet. 14-21. This Court does not grant certiorari, however, "to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S.

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[1] Petitioner offers no authority or logic for his passing assertion (Pet. 13) that a court violates "the separation of powers" by overturning a jury verdict under a statute that provides for a right to jury trial. The federal courts' authority, indeed obligation, to overturn civil jury verdicts not supported by the evidence is too firmly established and universally accepted to warrant further discussion. See *St. Mary's Honor Center*, 509 U.S. at 524 (contemplating review of jury verdicts in Title VII cases).

220, 227 (1925). The court of appeals' own review of the evidence was careful and thorough. Indeed, petitioner himself concedes (Pet. 13) that this is "a close case" as to whether the evidence was sufficient to sustain the jury's verdict.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ROBERT S. GREENSPAN
JENNIFER H. ZACKS
Attorneys

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[2] In fact, the record amply supports the court of appeals' conclusion that there was no evidence that GSA's challenged actions were the product of racial discrimination or retaliation. First, the parking spaces were available only to those employees who, unlike petitioner, were branch chiefs or were at or above the GS-13 level. See Pet. App. A16-A17. Second, petitioner was disciplined for tardiness only after he had been repeatedly late to work. See *id.* at A7, A14. Finally, both petitioner's loss of supervisory authority and his subsequent reassignment were part of an overall office downsizing. See *id.* at A5, A8, A19-A22.